

JUL 29 2003

NOT FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

**CATHY A. CATTERSON
U.S. COURT OF APPEALS**

RICHARD T AIELLO, et al.,

Plaintiffs - Appellants,

v.

SEARS TERMITE & PEST CONTROL
INC., a Florida corporation,

Defendant - Appellee.

No. 02-15067

D.C. No. CV-01-00908-SMM

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

Submitted July 18, 2003**
Pasadena, California

Before: NOONAN, KLEINFELD, and WARDLAW, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

The Aiello sought an injunction in the state court action, and the state judge decided upon arbitrability and all remaining issues, and thus the dismissal of their state action was both on the merits and final.¹ Because the issue was decided by the Arizona state courts, appellants are collaterally estopped from challenging the arbitrability of their claim. It is of no moment that their state appeal was dismissed as moot — the trial court judgment is still a final judgment with preclusive effect.² It was within the discretion of the district court to dismiss the action rather than stay it pending arbitration.³

AFFIRMED.

¹ See generally Gilbert v. Board of Medical Examiners, 745 P.2d 617, 622 (Ariz. App. 1987) (superseded on other grounds by statute as stated in Goodman v. Samaritan Health Sys., 990 P.2d 1061, 1067 n. 7 (Ariz. Ct. App. 1999).

² See Food for Health v. 3839 Joint Venture, 628 P.2d 986 (Ariz. Ct. App. 1981).

³ Sparling v. Hoffman Constr., 864 F.2d 635 (9th Cir. 1988).